

No. 84-16

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ALEXANDER L. STEVENS,  
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

KENNETH CORY, et al.,  
members of the California  
State Lands Commission,  
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,  
Appellees.

On Appeal from the United States Court  
of Appeals for the Ninth Circuit

BRIEF OPPOSING MOTION TO AFFIRM

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In this case, the Ninth Circuit held that the State of California is prohibited by the Commerce and Import-Export Clauses from using a volumetric form of rent, regardless of amount, when leasing unimproved state land to lessees engaged in interstate or foreign commerce. The State argues, inter alia, that the

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volumetric rental form is commonly used for ground leases of unimproved land, including leases by local ports to these very appellees, and that there is no constitutional principle that renders such a form of rent, per se and regardless of amount, constitutionally infirm.

In their motion to affirm, appellees characterize this form of ground lease rental as nothing more than a "tariff" under a different name, and therefore conclude that it violates the Import-Export Clause. They also characterize volumetric rent as an additional charge "tacked on" over and above a "fair" and "reasonable" rental, and therefore per se unreasonable under the Commerce Clause. Both arguments are dependent upon mischaracterizations of fact that are here refuted in summary fashion, as follows:

1. Because a tariff operates upon all units of an imported commodity, the

appellee companies falsely suggest that an equivalent situation exists here, misrepresenting (a) that the State has a monopoly of the land over which their commodity must pass (Motion, pp. 2, 4, 5, 7, 8), and (b) that mere transient passage "by sea" over such monopolized lands generates a volumetric charge (Motion, pp. 1-2). The facts are otherwise.

First, the State has no monopoly over tide and submerged lands; appellees' "throat of commerce" is a patchwork of ownerships. (See Jurisdictional Statement, pp. 8-9, fn. 6.) Just looking at the ownership of tide and submerged lands held by local cities, counties, and districts under legislative grants, and ignoring private grants of such lands, there are 418 miles of tidal shoreline and 305,381 acres (over 477 square miles) that are controlled by

local entities. (Cal. State Lands Com., Granted Lands Summary (1977).) The City of Los Angeles alone controls 26 miles of shoreline under such a grant, comprising 13,430 acres. (Ibid.) We are at a loss to know where appellees got their "99 percent" figure for state ownership (Motion, p. 2, fn. 1), and they give no supporting citation.

Second, and more importantly, it is not mere transient passage of commodities through state waters that may generate a volumetric charge, but only passage over a limited number of discrete parcels of state real property which are to be devoted, by lease, to exclusive private use, in this case including construction of improvements, such as wharves. Commodities passing over the lands of the local ports, for instance, do not generate any volumetric revenue to the State. The challenged regulations are leasing

regulations and it is clear from the face of them that the various forms of rent authorized therein do not apply in any transcendent, across-the-board fashion, independent of a document creating a leasehold and a consequent obligation to pay rent. Accordingly, the regulations do not authorize a tariff or anything like a tariff.

2. Volumetric rent is not "tacked on" over and above a fixed rental figure that already reflects the State's appraisal of a "fair" or "reasonable" rent. (See Motion, pp. 2, 8.) As with percentage leases, there is a fixed minimum rental figure which is applied against the accrued variable rent, and which is to be paid in any event, even if the rent accrued under the variable rent provision does not reach the minimum. In other words, there will be instances, even though commodities pass



over the leased land, where no rent will be paid above the minimum, because the volume of commodities was insufficient to generate a rent in excess of the minimum rent. In such cases, the flat minimum rent will be paid, and no more. The record is without dispute on this point. (Clerk's docket item 26, Horn Affidavit, pp. 5-6; Clerk's docket item 24 (leases attached to various declarations of appellees).) This interrelationship of a minimum rent figure with the variable rent provision of a lease conforms with standard practice under variable rent leases. (See Grenert, Ground Lease Practice (Cal.Cont.Ed.Bar 1971), §§ 1.40, 1.41, 2.12-2.14.)

Further, the amount of this minimum rent is itself subject to negotiation between the parties, and is not unilaterally set by any "state appraiser". (Horn Affidavit, supra, pp. 5, 7-8.)

CONCLUSION

Appellees' motion to affirm should be denied. Appellants respectfully request that the Court either summarily reverse, or set the case for plenary consideration.

DATED: August 13, 1984

Respectfully submitted,

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# Affidavit of Service by Mail

STATE OF CALIFORNIA

Cory, et al. v. Western Oil  
& Gas Assn., et al.  
U.S. Supreme Court

) ss.

CITY AND COUNTY OF SAN FRANCISCO )

Melinda M. Gee

on oath deposes and states: \_\_\_\_\_, being first duly sworn,

I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

## BRIEF OPPOSING MOTION TO AFFIRM

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

[3] Philip Marskey, Esq.  
Ingoglia, Marskey & Kearney  
918 - 2nd Street  
Sacramento, CA 95814

[3] Betty-Jane Kirwan, Esq.  
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600 Wilshire Boulevard  
Los Angeles, CA 90017

Each said envelope was then, on August 13, 1984, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

All parties required to be served have been served.

Melinda M. Gee  
AFFIANT

Subscribed and sworn to before me  
this 13th day of August, 19 84.

Cynthia S. Woo  
Notary Public in and for said County  
and State

